NO. 796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

INDUSTRIAL UNION OF MARINE
AND SHIPBUILDING WORKERS OF AMERICA,
AFL-CIO, AND ITS LOCAL 22

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus* in support of the position of the respondent is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 129 national and international labor unions having a total membership of approximately 14,000,000, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The opinions below, jurisdiction, questions presented and the statutory provisions involved are set out at pp. 1-2, 39-42 of the National Labor Relations Board's Brief.

SUMMARY OF ARGUMENT

By its terms, Section 8(b)(1)(A) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) requires a showing: first, that the conduct of the respondent union is directed toward a particular end, i.e. that it affects the exercise of a Section 7 right; and second, that this conduct constitutes a prohibited means of attaining that end, i.e. that it constitutes restraint or coercion as those terms were used by Congress. As this Court has stated, "the policy of the Act is to insulate employees' jobs from their organizational rights," *Radio Officers Union* v. *National Labor Relations Board,* 347 U.S. 17, 40 (1954). The Act, however, does not so insulate union membership as well. For Congress did not intend to denominate union disciplinary actions, such as expulsions or suspensions, which affect membership rights and not job rights, as restraint or coercion under the Act. Section 8(b)(1)(A) was enacted in 1947 and the decisions of this Court during the entire period subsequent to that date have been consistent with our view, *see Machinists* v. *Gonzales,* 356 U.S. 617, 620 (1958); *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.,* 388 U.S. 175 (1967).

The legislative history of Section 8(b)(1)(A) of the Act provides firm support for the position we urge. As Senator Ball, the sponsor of the provision which became Section 8(b)(1)(A), stated "it [a union] can expel him [a member] from the union at any time it wishes to do so and for any reason," 93 Daily Cong. Rec. 4400-4401 (April 30, 1947), 2 Legislative History of the Labor Management Relations Act of 1947 (G.P.O. 1948) 1131-1142. Indeed, when Congress did move to protect membership rights in 1959, it gave enforcement powers to the courts and the Secretary of Labor and not to the Board.

The essence of the Board's rationale for its holding that a union may not expel a member for failing to exhaust internal remedies for four months before filing a charge without violating Section 8(b)(1)(A) is that an expulsion or a fine, though not normally restraint or coercion within the meaning of the Act, may become illegal conduct under that Section if the end sought runs counter to public policy. The Board thus takes the position that, depending on the end sought, an otherwise legal means may become an unlawful means. The effect of this "logic" is to make it illegal for a union to do anything at all, no matter how innocent, if its aim is to have a member follow internal procedures before filing a charge. This result is patently unwarranted and impermissible. This Court's decision in *National Labor Relations Board* v. *Teamsters, Local 639 (Curtis Bros.)*, 362 U.S. 274 (1960) so holds. For there, this Court rebuffed the Board's attempt to use Section 8(b)(1)(A) to interdict peaceful picketing because that picketing had an ultimate object—to force recognition—which the Board believed to be against public policy. In reaching its conclusion, the Court emphasized (362 U.S. at 282, 290) that Section 8(b)(1)(A) gives the Board the limited authority to require the cessation of certain types of union conduct, principally violence, and that it does not empower the Board to prohibit the use of otherwise lawful means because of the end sought.

Even if the foregoing argument were to be rejected and this Court were to hold that the Board could interdict union expulsions which were against public policy, that holding would not justify the Board's decision here. As the court below properly recognized, the public policy of the United States on the issue presented in the instant case is set out in Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 411(a)(4)." That provision permits unions to discipline members who go to the Board without exhausting internal remedies for four

months. This is plainly the most logical conclusion to be drawn from the bare language and structure of Section 101(a)(4). It is also the most logical conclusion to be drawn from its legislative history. Originally, Section 101(a)(4) required exhaustion of internal remedies for six months. The six-month period of exhaustion was reduced to four months because both Senator Goldwater and Representative Griffin criticized the six-month time limit on the specific ground that while the union rules it allowed, if observed, would only delay access to the courts, it would enable a union, in effect, to bar a member from filing charges with the Board. The latter consequence flows from the fact that the Act's statute of limitations is six months. The Board has never applied an exhaustion of remedies rule and Congress was aware of this. In light of this demonstrated irrelevance of Section 101(a)(4) to the capacity of the Board to process charges, the great concern manifested about reducing the allowable exhaustion period from six months to four months is utterly inexplicable unless Congress intended to allow unions to discipline members who fail to exhaust their internal remedies.

ARGUMENT

EXPULSIONS AND OTHER NONVIOLENT FORMS OF UNION DISCIPLINE WHICH AFFECT ONLY MEMBERSHIP RIGHTS AND NOT JOB RIGHTS ARE BEYOND THE REGULATORY COMPETENCE OF THE NATIONAL LABOR RELATIONS BOARD

Section 8(b)(1)(A) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq*) states:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *"

Thus, by its terms, Section 8(b)(1)(A) requires a showing: first, that the conduct of the respondent union is directed toward a particular end, i.e. that it affects the exercise of a Section 7 right; and second, that this conduct constitutes a prohibited means of attaining that end, i.e. that it constitutes restraint or coercion, as those terms were used by Congress. Both elements of the offense must be proved in order to prove a violation of that Section. Thus it is sufficient for our purposes to show that an expulsion of a member from a union is not a prohibited means under Section 8(b)(1)(A), i.e. that it is not restraint or coercion within the intent of Congress. For once this point is established, it will be plain that the Board has failed to prove its case here.[1]

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[1] The court below also found that the conduct of the Union did not impinge on the exercise of a Section 7 right (App. 34-38). We agree with that conclusion but do not cover this narrower ground of decisions since it has been fully briefed by the Union.

1. As this Court has stated, "The policy of the Act is to insulate *employee's jobs* from their organizational rights" *Radio Officers Union* v. *National Labor Relations Board,* 347 U.S. 17, 40 (1954). (Emphasis added.) The Act, however, does not so insulate union membership as well. For Congress did not intend to denominate union disciplinary actions, such as expulsions or suspensions, which affect membership rights and not job rights, as restraint or coercion under the Act. Section 8(b)(1)(A) was enacted in 1947; and for 17 years thereafter, until the decision in *Local 138, I.U.O.E. (Charles S. Skura),* 148 NLRB 579 (1964) and *H. B. Roberts,* 148 NLRB 674 (1964), *enforced* 350 F.2d 427 (C.A. D.C. Cir., 1965), which are the predicate for the decision here, the Board and the courts recognized without exception this limitation on the scope of the Act, *see, e.g., Minneapolis Star & Tribune Co.,* 109 NLRB 727 (1954) (fine for failing to attend meetings and to perform picket duty not violative of Section 8(b)(1)(A); *American Newspaper Publishers Assn.* v. *National Labor Relations Board,* 193 F.2d 782 (C.A. 7th Cir. 1951) *certiorari denied on this point* 344 U.S. 812 (threat of expulsion to force commission of alleged unfair labor practices not violative of Section 8(b)(1)(A)); *NLRB General Counsel Administrative Ruling,* Case No. 1059, 35 LRRM 1167 (1954) (no complaint would issue because of suspension for filing charges with the Board); *NLRB General Counsel Administrative Ruling,* Case No. K-103, 37 LRRM 1103 (1955) (no complaint would issue because of fine for failing to exhaust internal remedies before instituting a charge). For this reason, in *Machinists* v. *Gonzales,* 356 U.S. 617 (1958), which holds that the pre-emption doctrine does not apply where the gravamen of the complaint is that there has been an illegal interference with union membership rights, this Court stated (*Id.* at 620):

> "The protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to §8(b)(1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .'"

Moreover, even after the *Skura* decision, this Court in its decision in *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967), continued to hew to the essence of *Gonzales*. In *Allis-Chalmers* the union levied fines enforceable by court action, and in one case enforced by court action, on members who crossed the union's picket line. The argument that resort to a judicial forum takes this form of discipline out of the category of internal union discipline, and that the aid of the state so enhances the nature of the union's action that a court-enforced fine should not be considered a lesser included means of union discipline permitted by Congress in the proviso to Section 8(b)(1)(A), may be said to be not completely without logic. Nevertheless, this Court did not accept that argument and held that the fines in question were not restraint and coercion within the meaning of the Act. The Court's opinion first rejects the position, espoused by the Seventh Circuit in its opinion, that the meaning of "restrain or coerce" is precise and unambiguous by showing that a literal application of these words would lead to anomalous results which can in no way be said to have been envisaged by Congress (388 U.S. at 178-184). The Board argues (Bd. Br. 18-20) that this portion of the opinion is a policy ground for its ultimate holding. We submit that it is not. Rather it is the predicate for the Court's conclusion that an exploration of the legislative history was necessary in order to ascertain Congress's intent in enacting Section

8(b)(1)(A). The Court's holding, arrived at after a painstaking exploration of that history (388 U.S. at 184-193), was that, even without consideration of the proviso to Section 8(b)(1)(A) (*Id.* at 192), the legislative history shows (*Id.* at 195):

> "'. . . that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status.''

And, even the dissent by Mr. Justice Black assumes that taking into account that proviso, all expulsions no matter what their basis are beyond the ambit of the Board's control (*Id.* at 214). The language of the Act and the overwhelming weight of its legislative history demonstrate that this conclusion is the only permissible one. Since this legislative history was fully explored in *Allis-Chalmers,* we note here only the major points.

Senator Ball, backed by Senator Taft, sponsored the amendment to S. 1126, 80th Cong., 1st Sess. (1947) which became Section 8(b)(1)(A) of the Act. See 93 Daily Cong. Rec. 4398-4401 (April 30, 1947), *Id.* at 4568 (May 2, 1947), 2 Legislative History of the Labor-Management Relations Act of 1947 (G.P.O. 1948) 1138-1143, 1216-1217 (hereinafter Leg. Hist.). Senator Ball said flatly:

> "It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions. . . . *It [a union] can expel him [a member] from the union at any time it wishes to do so, and for any reason.''* 93 Daily Cong. Rec. 4400-4401 (April 30, 1947), 2 Leg. Hist. 1141-1142. (Emphasis added.)

Nonetheless, out of an excess of caution, Senator Ball accepted as an amendment to his proposed Section 8(b)(1)(A) the present proviso to that Section. The sponsor of the proviso, Senator Holland, stated:

> "I have had some discussion with . . . Senators [sponsoring Section 8(b)(1)(A)] in reference to the meaning of the pending amendment [to enact Section 8(b)(1)(A)] and as to how seriously, if at all, it would affect the internal administration of a labor union. *Apparently, it is not intended by the sponsors of the amendment to affect at least that part of the internal administration which has to do with the admission or expulsion of members, that is, with the question of membership. So I offer an amendment . . .*" 93 Daily Cong. Rec. 4398 (April 30, 1947), 2 Leg. Hist. 1139. (Emphasis added.)

And Senator Ball explained the import of the entire provision as follows:

> "That modification is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its effort to organize unorganized employees. . . . *The modification covers the requirements and standards of membership in the union itself.*" 93 Daily Cong. Rec. 4559 (May 2, 1947), 2 Leg. Hist. 1200. (Emphasis added.)

The views of Senator Taft were consistent with those of Senators Ball and Holland. Thus, in urging the adoption of a provision to outlaw union restraint or coercion of employees, Senator Taft stated:

> "The language is perfectly clear. It has been interpreted by the courts. An employer cannot go to an employee and say, 'If you join this union you will be discharged.' He cannot go to an employee and threaten physical violence. He cannot employ police to accomplish that purpose. Now it is proposed that the union be bound *in the same way.* What could be more reasonable than that? Why should a union be able to go to an employee and threaten violence if he does not join the union? Why should a union be able to say to an employee, 'If you do not join this union we will see that

you cannot work in the plant'? What possible distinction can there be between an unfair labor practice of that kind on the part of an employer and a similar practice on the part of a union," 93 Daily Cong. Rec. 4142 (April 25, 1947), 2 Leg. Hist. 1025. *See also* S. Rep. No. 105, 80th Cong. 1st Sess., p. 20 (Supplemental Views) (1947), 1 Leg. Hist. 426.

But the protections afforded against union conduct were to extend only to the area already protected against employer conduct, an individual's status as an employee. They were not to extend to an individual's status as a union member. Senator Taft reiterated this theme on several occasions in connection with the provision which was to become Section 8(b)(2):

"The pending measure does not propose *any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members.* All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion." 93 Daily Cong. Rec. 4318 (April 29, 1947), 2 Leg. Hist. 1097. (Emphasis added.)

* * * *

"We had testimony regarding the case of a union member who saw a shop steward knock down a foreman; and the union member was subpenaed to testify in court in the assault case. He testified truthfully that he saw the shop steward take the offensive and knock down the foreman. Thereupon, the union said that such testimony was contrary to good union practice, even though the union member had been subpenaed and was under oath to testify to the truth; and the union discharged him from union membership, and the employer had to discharge him, under the existing closed-shop contract.

> "In a case of that sort, the committee bill provides that the employer does not have to fire the employee. *The union can discharge him from union membership if it wishes to do so, but the employer does not have to discharge him from employment.*" 93 Daily Cong. Rec. 5088 (May 8, 1947) 2 Leg. Hist. 1420. *See also* 93 Daily Cong. Rec. 4317-4318 (April 29, 1947), 2 Leg. Hist. 1096 (Emphasis added.)

The proviso to Section 8(b)(1)(A) appeared unchanged in H.R. 3020, 80th Cong., 1st Sess. (1947), as passed by the Senate. With the substitution of the word "paragraph" for "subsection," it became part of the Conference Agreement and of the Taft-Hartley Act as finally passed.

As the last quotation indicates, Congress did not act in ignorance of the possibility that a union might discipline a member for filing charges or testifying against the union. Section 8(a)(4), making it an unfair labor practice for employers to take reprisals against employees who file charges or give testimony, had been on the books since the original Wagner Act. The Taft-Hartley Act provided no counterpart for union reprisals. But the Hartley bill, H.R. 3020, 80th Cong., 1st Sess. (1947), as reported to and passed by the House, contained in its Section 8(c) what was described by the House Labor Committee as a "bill of rights for union members." *See* H. Rep. No. 245, 80th Cong., 1st Sess., p. 31 (1947) 1 Leg. Hist. 322. Section 8(c)(5) would have made it an unfair labor practice for a union

> "to fine or discriminate against any member, or subject him to any discipline or penalty, on account of his having criticized, complained of, or made charges or instituted proceedings against, the organization or any of its officers. . . ."

Section 8(c)(5) was omitted, of course, from Taft-Hartley as eventually enacted. The House conferees commented:

> "Section 8(c) of the House bill contained detailed provisions dealing with the relations of labor organiza-

> tions with their members. One of the more important provisions of this section—that limiting the initiation fees which a labor organization may impose where a permitted union shop or maintenance of membership agreement is in effect—is included in the conference agreement (sec. 8(b)(5)) and has already been discussed. *The other parts of this subsection are omitted from the conference agreement as unfair labor practices.*" H. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 46 (1947), 1 Leg. Hist. 550. (Emphasis added.)

Significantly, the only portion of Section 8(c) which was retained by the conferees was the prohibition of excessive initiation fees as a condition of employment. This is in accord with the Taft-Hartley pattern of protecting employees in their status as employees, but not in their status as union members. The House's proposed ban on union fines or discipline where members file charges against the organization was deleted, with full awareness of the import of that deletion.

There are isolated pieces of the legislative history, *see* 93 Daily Cong. Rec. 4023 (April 25, 1947), 2 Leg. Hist. 1028, (Sen. Taft) 93 Daily Cong. Rec. 5001 (May 12, 1947), 2 Leg. Hist. 1472 (Sen. Wiley)[2] and a sentence or two of the

[2] The main thrust of these statements is directed toward the possibility of procedurally defective discipline, i.e. discipline by the fiat of undemocratic leaders, and not toward the possibility of discipline on a ground alleged to be against public policy. And there has been no showing here that the Union's rule was vague or that its hearing procedures were not fair. Indeed, the Union's members had a right to appeal any disciplinary penalty to the general membership of the local (App. 6). Moreover, at the present time every union disciplinary action must meet the standards set by Congress in Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411(a)(5). Thus, the Board's contention (Bd. Br. 24-25 and notes 26, 27) which is based on pre-1959 secondary sources, that if it does not have jurisdiction union members will be subjected without suitable redress to defective hearing procedures, is simply incorrect.

opinion of the Court in *Allis-Chalmers* (*Id.* at 192-193, 194-195)[3] which, if they stood alone, as they do not, might support the conclusion that Congress allowed the Board to police union expulsions which are "unreasonable." We submit, however, that the overwhelming weight of that history, *see particularly* the emphasized portions of the quotations on pp. 8-11, *supra.*, and the actual holding of the Court support our conclusion that all union discipline, whether the Board considers it reasonable or unreasonable, is conduct the regulation of which is outside of that agency's regulatory authority. This conclusion is strengthened if Section 8(b)(1)(A) is placed in perspective in the overall pattern of Congressional regulation of labor unions. For the fact of the matter is that until 1959 Congress never sought to protect membership rights in a union, and that when it did so it gave the courts and not the Board the jurisdiction to protect those rights. As this Court noted in *Allis-Chalmers* (388 U.S. at 193-194):

> "The 1959 Landrum-Griffin amendments, thought to be the first comprehensive regulation by Congress of the conduct of internal union affairs, also negate the reach given §8(b)(1)(A) by the majority en banc below. 'To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit.' Labor Board v. Drivers Local Union, 362 US 274, 291-292. In 1959 Congress did seek to

[3] Nothing in the Court's opinion supports the argument that the legality of expulsions, or other means of union discipline, depends on the end sought. Rather these statements indicate that if the means takes a particular form—a fine of over $100 or a fine levied by the fiat of an undemocratic union leader—it may not be legal.

protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline. The Eighty-sixth Congress was thus plainly of the view that union self-government was not regulated in 1947."

2. The essence of the Board's reply to the foregoing, as we glean it from the opinion in *Skura* and its brief here (Bd. Br. 16-17, 19-22), is that an expulsion or a fine, though not normally restraint or coercion, *compare Wisconsin Motor Corp.* 145 NLRB 1097, 1100, 1104 (1964) *enforced sub nom Scofield* v. *National Labor Relations Board,* ..... F.2d ...., 67 LRRM 2673 (C.A. 7th Cir., 1968) *Allis-Chalmers Manufacturing Co.,* 149 NLRB 67, 69 (1964), may become illegal conduct under Section 8(b)(1)(A) if the end sought runs counter to public policy. To us this signifies that the Board takes the position that depending on the end sought an otherwise legal means may become an unlawful means. The effect of this "logic" is to make it illegal for a union to do anything at all, no matter how innocent, if its aim is to have a member follow internal procedures before filing a charge. Thus, on this theory, a union would commit an unfair labor practice if it went to a member and peacefully reasoned with him in an attempt to convince him that it is in his best interest to exhaust his internal remedies first. No other result can follow from the Board's premise that it is the end sought, and that alone, which demonstrates the illegality of the union's internal disciplinary action here. And such a result is patently unwarranted and impermissible. Indeed, this Court's decision in *National Labor Relations Board* v. *Teamsters, Local 639 (Curtis Bros.),* 362 U.S. 274 (1960) so holds. For there, this Court rebuffed the Board's attempt to use Section 8(b)(1)(A) to prohibit the use of peaceful

picketing because that picketing had an ultimate object—to force recognition—which the Board believed to be against public policy. In reaching its conclusion, the Court emphasized (362 U.S. at 282, 290) that Section 8(b)(1)(A) gives the Board the limited authority to require the cessation of certain types of union conduct, principally violence, and that it does not empower the Board to interdict otherwise lawful means because of the end sought.

To put the foregoing another way, the Board's premise here appears to be that it is somehow vaguely more reprehensible for a union to discipline a member for filing unfair labor practice charges than for working behind a picket line. Since the means used is the same in each instance, this indicates that the Board justifies its holding on the ground that a more important Section 7 right is at stake in *Skura,* and the instant case, than in *Allis-Chalmers.* But overloading one factor in a multiplication cannot vary the result when the multiplier remains zero. A million multiplied by zero is the same as one multiplied by zero; it is zero. So too, it makes no difference whatsoever whether a great or insignificant Section 7 right is involved. Indeed, we do not believe that such gradations in Section 7 rights exist under the Act. It is not the Board's function to set up a hierarchy of Section 7 rights each of which is then accorded a different degree of protection proper to its relative station. *Cf. National Labor Relations Board* v. *Insurance Agents Union,* 361 U.S. 477 (1960). Thus, so long as a union does not resort to the forbidden *means* of violence or job discrimination, it cannot possibly violate Section 8(b)(1)(A), no matter how it may otherwise be said to impinge on a Section 7 right through internal discipline. For in the absence of violence or job discrimination, one of the essential elements of a Section 8(b)(1)(A) offense is simply not present.

The Board in its brief (Bd. Br. 15, 16) tries to paper over these fatal difficulties by stating that the expulsion here is coercive. But repetition of a characterization which has no logical underpinning does not supply that underpinning. If, as has now been settled, the fine enforceable by court action in *Allis-Chalmers* was not restraint or coercion, then the expulsion here cannot accurately be so characterized. Equally unavailing to the Board is the rationale offered by the District of Columbia Court in the *Roberts* case: "by filing a charge . . . [the union member] stepped beyond the internal affairs of the Union and into the public domain," 350 F.2d at 429. For it is equally true that the members who crossed the picket line at Allis-Chalmers quite literally "stepped beyond the internal affairs of the union." The test of whether a particular disciplinary action is an aspect of the union's internal affairs for the purposes of the Act does not turn on the nature of the members' derelection, but rather on the means chosen by the union in disciplining him. If the *Roberts* rule were correct in holding that legality turns on what the member has done, a union could have a man discharged for failing to come to union meetings. For the member's course of action is certainly related to internal union affairs. But since *Radio Officers* there can be no doubt that the union would commit a violation of the Act in such a case since it is the union's conduct which is the determinative factor.

Finally, it is plain that the Board cannot find support for its position in this Court's decision in *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1968). That case, of course, affirms the general proposition that one of the purposes of the Act is to insure that "people [are] free to make charges of unfair labor practices" without being coerced, *Id.* at 236. The Board, however, is not empowered

to enforce this broad policy in every instance; it is empowered only to remedy unfair labor practices. This is not a distinction without a difference. If, for example, Mrs. Nash's bank, acting alone and not as an agent of her employer, had cancelled a loan to her because she had filed a charge, its action would contravene public policy but would not constitute an unfair labor practice. For Section 8 applies only to employers, unions and their agents. By the same token, the general proposition enunciated in *Nash* does not show that an expulsion is coercion within the meaning of Section 8(b)(1)(A) and its proviso. To the contrary, as we have demonstrated, pp. 6-14, *supra.*, Congress made it plain that expulsions, suspensions, and other nonviolent union discipline which affect a union member as a member and not as an employee are not the types of conduct interdicted by that Section.

3. As we have just shown, even if an expulsion of a union member for failing to exhaust internal remedies were to be held to be against public policy, that holding would not help the Board; but we need not rest on this point alone, for in fact the Board's conception of the applicable public policy here is wrong. As the court below properly recognized (App. 38-40), the public policy of the United States on the issue presented here is set out in Section 101(a)(4) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 411 (a)(4)) which states:

> "*Protection of the Right to Sue.*—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any leg-

islature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * *."

And that provision permits unions to discipline members who go to the Board without exhausting internal remedies for four months.

This is plainly the most logical conclusion to be drawn from the bare language and structure of Section 101(a)(4). As the court below stated (App. 39-40):

> "To avoid the impact of this proviso, the Board argues that the proviso does not say who may require the union member to exhaust internal hearing procedures and then reaches the surprising conclusion that it is the Board, rather than any labor organization, that is authorized by Congress to require that a union member resort to reasonable intra-union procedures. We think this construction does violence to the structure and the sense of section 101. That section is entitled, "Bill of rights; constitution and bylaws of labor organizations." It consists of a number of provisions prescribing what unions may and may not do and require in the conduct of their affairs and in the treatment of their members. The general prohibition in the subsection here in question is expressly directed against labor organizations. Logically, and in normal reading, the attendant and qualifying proviso is an exception stating what such an organization may do despite the preceding general restriction upon its action. Moreover, there is no need for a proviso to authorize a court or an administrative body to postpone its action until a litigant shall exhaust intra-union remedies, since judicial and quasi-judicial bodies frequently exercise such discretionary power to postpone their own action pending the exhaustion of other remedies as a matter of inherent right without benefit of legislation."

This reasoning follows the lead of the decisions of this Court. The office of a proviso is well understood. It is "to except something from the operative effect, or to qualify the generality, of the substantive enactment to *which it is attached.*" *Cox* v. *Hart*, 260 U.S. 427, 435 (1922). (Emphasis added.) *See also* 2 Sutherland, Statutory Construction, § 4932, p. 469 (3d ed., 1943). *Cf. National Labor Relations Board* v. *Servette, Inc.*, 377 U.S. 46 (1964): "There is nothing in the legislative history which suggests that the protection of the proviso [to Section 8(b)(4) of the Act] was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress." The prohibition of Section 101(a)(4) clearly applies to *union-imposed* restrictions. It follows that the exception contained in the proviso must likewise apply to *union-imposed* restrictions. Accordingly, the authorization for a requirement that union members pursue internal remedies for four months must be an authorization for such a requirement when imposed by *unions*.

As the Board points out (Bd. Br. 21 n. 21), there are two rather distinct forms of the exhaustion of remedies doctrine. The first is a jurisdictional rule which sets the time at which a case involving associational rights is to be considered ripe for adjudication. It rests on the wisdom of judicial self-restraint when a dispute is within the purview of a private tribunal and is applicable whether or not there is an associational bylaw which requires resort to internal remedies at the pain of sanctions such as expulsion or suspension. The second is a rule which states that union disciplinary actions based on a requirement of exhaustion of remedies are actions based on a valid norm and for that reason are not to be upset by the courts. This being so, it is within the realm of possibility to assign two

readings, other than the one we urge, to the proviso to Section 101(a)(4). One would be that the proviso relates to and regulates both forms of the exhaustion doctrine. The other is that the proviso relates to and regulates only the jurisdictional rule. Only the last reading of the proviso would help the Board here. Thus, and this is particularly true in light of the structure of Section 101(a)(4), it is incumbent upon the Board to show that the legislative history precludes both the natural reading of the proviso, and the reading which assigns the proviso a role with respect to both forms of the exhaustion doctrine. The weight of this considerable burden is increased by the fact that the construction the Board proposes creates two serious policy problems while the construction we propose creates none, *see* pp. 25-29 *infra*.

The first of these problems relates to the separation of powers between the legislative and judicial branches of government. The construction the Board argues for would require both federal and state courts to hear a case four months after the cause of action arises, even though the union discipline in question was based on a complicated and arcane rule relating to the purely fraternal aspects of the association, even though the discipline had been stayed pending internal appeals, and even though the union's internal appeal apparatus was sound and fair. In short, it would require the court to act even though the case is clearly not ripe for adjudication. For if the exhaustion of remedies rule had been modified by Section 101(a)(4) to allow the courts to permit only four months of exhaustion, then that Section must mean that they can never under any circumstances refuse to hear a case after that period has elapsed. Such a direction from Congress to the courts would, of course, trench on the inherent powers of the latter in a most dangerous, and possibly unconstitu-

tional manner, *see e.g. Marbury* v. *Madison*, 1 Cranch 137 (1803). The second of these problems relates to federalism. The LMRDA applies to state as well as federal courts. It seems unlikely that Congress would undertake a task as sensitive as regulating state court procedure without giving a clear indication of its intent to do so. Yet, there is no such indication in the legislative history of Section 101 (a)(4).

With this background in mind we turn now to the legislative history. The present Section 101(a)(4), including the proviso, is with one exception exactly the same as Section 101(a)(4) of S. 1555, 86th Cong., 1st Sess., as it passed the Senate, see 1 Legislative History of the Labor Management Reporting and Disclosure Act of 1959, p. 520 (G.P.O. 1959) (hereinafter Leg. Hist. LMRDA). That exception is that S. 1555 allowed for six months of exhaustion while the LMRDA allows for only four months. Both Senator Goldwater and Representative Griffin criticized the six-month time limit in S. 1555 on the specific ground that while the union rules it allowed, if observed, would only delay access to the courts, it would enable a union, in effect, to bar a member from filing charges with the Board since the statute of limitations under the Act is also six months. Said Senator Goldwater:

> "If, in order to be eligible for the protection of his right to sue under this provision of the bill of rights, a union member must wait 6 months while exhausting his internal union hearing procedures, he finds that the NLRB will refuse to process his unfair labor practice charge because the Taft-Hartley Act's 6-month time limitation on the filing of charges has run out. On the other hand, if having failed to exhaust his union hearing procedures, he fails to wait the required 6 months and files his charge with the NLRB in order to escape the Taft-Hartley time limitation, he loses the protection of the right to sue provision of the bill of rights,

and the union, if it wishes *may discipline him for having filed the charge.*" 105 Daily Cong. Rec. 9108 (June 8, 1959), 2 Leg. Hist. LMRDA 1280. (Emphasis added.) *See also* 105 Daily Cong. Rec. 6847 (May 7, 1959), 2 Leg. Hist. LMRDA 1270 (Sen. Goldwater).

The Landrum-Griffin bill, H.R. 8400, 86th Cong., 1st Sess., in a provision identical to Section 101(a)(4) of the LMRDA as passed, met this criticism by reducing the time period from six months to four. The two co-sponsors, Representatives Landrum and Griffin, explained the change as follows:

> "Since the Taft-Hartley law prescribes a 6-month statute of limitations for the filing of unfair labor practice charges, the Senate's 6-month limitation might prevent a member's access to remedies provided under the National Labor Relations Act. In the substitute, we have specified a 4-month limit for pursuit of internal union remedies under the bill of rights." 105 Daily Cong. Rec. 13089 (July 27, 1959), 2 Leg. Hist. LMRDA 1520. *See also* 105 Daily Cong. Rec. 14193-14194 (Aug. 11, 1959), 2 Leg. Hist. LMRDA 1566-1567 (Rep. Griffin).

The modification satisfied the objections of Senator Goldwater, who said:

> "The Landrum-Griffin bill, both as introduced and as passed, cut such waiting period to 4 months thus eliminating the gimmick and preserving the union member's rights both under the bill of rights and under the Taft-Hartley Act." 105 Daily Cong. Rec. A8510 (Oct. 2, 1959), 2 Leg. Hist. LMRDA 1844.

After the Conference Committee on the LMRDA had accepted the basic approach of Section 101(a)(4) of S. 1555 with the modified time limit of four months suggested by the House, Senator Kennedy, the sponsor of S. 1555 and the Senate spokesman at the Conference, made it absolutely clear that the focus of the Section was on union imposed limitation and that it was not intended to straight-jacket

the courts in applying their jurisdictional rules. No other conclusion can be drawn from his statement when it is read in full:

> "The protection of the right to sue provision originated in the Senate bill and was adopted verbatim in the Landrum-Griffin bill except that the first proviso limiting exhaustion of internal hearing procedures was changed from 6 months to 4 months. The basic intent and purpose of the provision was to insure the right of a union member to resort to the courts, administrative agencies, and legislatures without interference or frustration of that right by a labor organization. On the other hand, it was not, and is not, the purpose of the law to eliminate existing grievance procedures established by union constitutions for redress of alleged violation of their internal governing laws. Nor is it the intent or purpose of the provision to invalidate the considerable body of State and Federal court decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to court intervention depending upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case. So long as the union member is not prevented by his union from resorting to the courts, the intent and purpose of the "right to sue" provision is fulfilled, and any requirements which the court may then impose in terms of pursuing reasonable remedies within the organization to redress violation of his union constitutional rights will not conflict with the statute. The doctrine of exhaustion of reasonable internal union remedies for violation of union laws is just as firmly established as the doctrine of exhausting reasonable administrative agency provisions prior to action by courts.
>
> "The 4-month limitation in the House bill also relates to restrictions imposed by unions rather than the rules of judicial administration or the action of Government agencies. For example, the National Labor Relations Board is not prohibited from entertaining

charges by a member against a labor organization even though 4 months has not elapsed." 105 Daily Cong. Rec. 16414 (Sept. 3, 1959) 2 Leg. Hist. LMRDA 1432, *see also* 105 Daily Cong. Rec. 14356 (Aug. 12, 1959) 2 Leg. Hist. LMRDA 1632 (Rep. O'Hara).

The last sentence of Senator Kennedy's remarks, which was echoed by Representative Griffin, 105 Daily Cong. Rec. A7915 (Sept. 10, 1959) 2 Leg. Hist. LMRDA 1811, reinforces our argument. For the Board has never applied an exhaustion of remedies rule and Congress was aware of this, *see e.g.* 105 Daily Cong. Rec. 14495 (Aug. 13, 1959), 2 Leg. Hist. LMRDA 1667 (Rep. McCormack). In light of this demonstrated irrelevance of Section 101(a)(4) to the capacity of the Board to process charges, the great concern manifested about reducing the allowable exhaustion period from six months to four months becomes utterly inexplicable unless our proposition is sound. The proviso must apply to internal union discipline of members for filing charges with the Board. In revising the proviso, Congress was intent only on preventing union disciplinary rules from requiring exhaustion for such a long period that a member who complied with the union's rules would be barred by the six-month statute of limitations from subsequently filing charges with the Board if intraunion relief was not obtained. Implicit in this approach is congressional acceptance of union rules requiring exhaustion of internal remedies for the lesser period of four months before filing unfair labor practice charges.

As the Board notes (Bd. Br. 32-33), it is true that statements were made in the House which would indicate that the proviso did apply to the jurisdiction form of the exhaustion doctrine. But this does not prove the Board's case. For these statements are equally consistent with the view that the proviso affects the exhaustion doctrine in

both its aspects.[4] None of them stand for the proposition that the proviso is addressed solely to the jurisdictional rule. And only that proposition can aid the Board.

4. Since Congress has spoken we believe that it borders on presumption to argue the soundness of the policy choice it made. But the Board's brief is devoted, to a substantial degree, to an attempt to show that union discipline of members who do not exhaust internal remedies for four months is against public policy (Bd. Br. 20-27). The Board's arguments are unsound and should not stand unrebutted.

Public policy in this area must take into account and balance the interest of the complaining union member, the administration of the Act, and the union as an institution. First, there are the interests of the allegedly aggrieved union member. We submit that our position has a minor impact on his interests. It is plain that no matter how this case is decided, he will continue to receive protection against union violence, or union-caused job discrimination, in reprisal for his exercise of Section 7 rights since both are means for enforcing union rules which have been interdicted by Section 8(b)(1)(A). The member is also guaranteed "reasonable hearing procedures" within the union as the *quid pro quo* for the union's right to discipline him for bypassing internal procedures. Moreover, no matter

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[4] As Congressman Foley, who is quoted by the Board, went on to state, 105 Daily Cong. Rec. 15563 (Aug. 17, 1959), 2 Leg. Hist. LMRDA 1600:

> "The Griffin bill does not indicate who will decide if and when a member is required to exhaust the internal remedies. Can the member decide? Can the union decide? Must a court decide? Must the Secretary of Labor decide? By making the exhaustion of remedies discretionary and without indicating who has the power to exercise the discretion, the Griffin bill creates confusion and does not define and protect any right of a union member."

how this case is decided and no matter what the member does in contravention of the union's rules, he will continue to receive the protection of the right to fair representation by the union, *see e.g. Vaca* v. *Sipes,* 386 U.S. 171 (1967). And it is also plain that if this Court should hold that union expulsions are completely outside the regulatory competence of the Board, unions would not gain the power to discipline members who go to the Board after exhausting their internal remedies for four months. For a union to attempt to do so would be for it to violate Section 101(a)(4) of the LMRDA. Thus, we take it that the Board's concern (Bd. Br. 24-25) that a member may "tire and give up" if required to exhaust internal remedies is rhetoric pure and simple.

It is, of course, true (Bd. Br. 25-26) that the requirement, added by Congress for the benefit of union members, that the union must provide "reasonable hearing procedures" if it wishes to discipline members who bypass an internal appeal, may cause a member to decide to go directly to the Board. The only time this will have practical consequences for the member is when the union does, in fact, provide reasonable hearing procedures. Congress sought to meet this problem, which does not appear to us to be of major dimensions since the Congressional standard is not a complex one, by reducing the exhaustion period to four months, thereby protecting ultimate recourse to the Board for a member who is in doubt as to whether his union's procedures are reasonable. It is true that this solution may delay recourse to the Board. But Congress decided that this delaying or "chilling" effect, to use the Board's phrase, was warranted. That it seems to us is the end of the matter. For the Board's argument on this point is really that it was impermissible for Congress to solve the problem as it did or indeed to do anything less than validate every union

rule requiring exhaustion, or none of them, because a more discriminating approach could be a snare to a member faced with a debatable situation. There can be no doubt that this argument is novel in its approach to the powers of Congress but it can hardly be said to be sound.

Second, there is the interest of the Board in administering the Act. While the Board does not acknowledge the point, there are substantial benefits for it in the position we advocate. The general policy favoring conservation of judicial resources—of not deciding cases which nonjudicial corrective measures may render moot—lends weight to the exhaustion rule. And even if the controversy ultimately reaches the Board, review within the union may have sharpened the issues by narrowing and clarifying the points in dispute and by providing additional information and insight on those points. These factors seem especially pertinent in the instant context since the Board must cope as best it can with a veritable avalanche of charges. To be sure, the Board does enforce rights that are in part public and in part private, *see International Union UAW* v. *Scofield*, 382 U.S. 205, 218 (1965). This, however, does not mean, as the Board seemingly argues (Bd. Br. 23-24), that private resolution of a dispute within its competence is against public policy. The very purpose of the national labor policy is to encourage the formation of private institutions, such as arbitration panels and union tribunals, which are competent to deal with problems which might otherwise prove to be a threat to the uninterrupted flow of commerce. *Cf. United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 566-568 (1960). Indeed, the Board has recognized that this is so and has demonstrated the fallaciousness of its argument here by deferring to private machinery for dispute resolution even though the party with the underlying complaint is not satisfied with the result reached by that machinery, *see e.g. Ramsey* v.

National Labor Relations Board, 327 F.2d 784 (C.A. 7th Cir. 1964), *certiorari denied* 377 U.S. 1003. And here, of course, we do not ask for that much. We make no contention that the Board should completely defer to a union tribunal if the member remains dissatisfied after four months. If, after that time, the member is still dissatisfied, we fully recognize that the union can do nothing to deprive him of his day before the Board. But surely, in light of Section 10(b) it is accurate to say that the Board exists only to solve the problems of those who have a grievance and that it was not created to roam at large doing good as it sees it. And Congress has not decreed that the Board is to be the only tribunal in the field. Its function is to supplement other private tribunals if and when they fail to solve a problem and not to supplant them in the first instance, *Cf. Carey* v. *Westinghouse Electrical Corp.*, 375 U.S. 261, 265, 272 (1964).

Finally, there are the interests of the union as an institution. It benefits from the permission to require exhaustion by gaining the opportunity to solve a problem without expending the time and money, and suffering the embarrassment, that are inherent in a public contest. Internal responsibility and control are strengthened if members are encouraged to settle problems within the organization. Moreover, lawsuits tend to harden positions, to force a choice between extremes, and to permit only one victor. For unions, more than for many other litigants, this is likely to be an unsatisfactory solution. While other adversaries may separate after the decision, the union and its complaining member must continue to work in close relationship. Internal remedies—especially where informal, private, and flexible—can promote compromise and thus the interests of all the parties. Of course, as the Board notes (Bd. Br. 23-24), the union may fail. But if it does, it faces the probability of enhanced liability if its processes cause

delay. This is a potent spur for it to disclaim jurisdiction if the member's complaint encompasses a matter beyond the union's competence to handle.

We submit that a balancing of the foregoing considerations leads to the conclusion that Congress was correct in deciding that the limited right to discipline members for bypassing internal remedies it accorded to unions is consonant with the public interest.

5. The burden of our argument has been that it would be unfaithful to the limited role Congress envisaged for the Board, both in 1947 and 1959, to allow it to exert any control at all over nonviolent union discipline that affects membership rights but not job rights. We have argued further that even if the Board has a function to perform in this area, it would be unfaithful to the public policy of the United States as enunciated in Section 101(a)(4) of the LMRDA, which is to preserve internal union hearing procedures by allowing unions to discipline members who do not exhaust their internal remedies for four months, to allow the Board to find that such discipline is an unfair labor practice. We believe that vital and legitimate interests would be impaired if this Court were to reject either or both of these arguments. But should it do so and enforce the Board's order, we submit that the Court should at the same time make it clear that the Board and the Ninth Circuit were correct in holding that it is not an unfair labor practice to expel or suspend a member who files a decertification petition against his own union, *United Steelworkers of America, Local 4028*, 154 NLRB 692 (1965), *affirmed sub nom Price* v. *National Labor Relations Board*, 373 F.2d 443 (C.A. 9th Cir., 1967), *pending on a petition for certiorari* No. 399 This Term. A reversal of the Board's policy on this issue would strike a blow at the very existence of

unions that should on no account be countenanced. As the Ninth Circuit noted (373 F.2d at 447):

> "[Price, the suspended union member] sought to attack the union's position as bargaining agent, which is, as the Board says, in a very real sense an attack on the very existence of the union. We think that, at the least, the proviso [to Section 8(b)(1)(A)] was intended to permit the union to suspend or expel a member who takes such a position. Otherwise, during the pre-election campaign, the member could campaign against the union while remaining a member and therefore privy to the union's strategy and tactics. We can see no policy reason for requiring the union to retain a member who takes such a position."

Both the inhibitions placed upon unions by Title I of the LMRDA, and the rights specifically preserved to unions in that Title support the approach of the Ninth Circuit. A union cannot effectively wage its election campaign if its opponents—the very persons seeking to decertify it—are entitled to "equal rights and privileges . . . to participate in the deliberations and vote upon the business of [its] meetings"—rights and privileges guaranteed to *members* by Section 101(a)(1). Moreover, Congress expressly preserved the right of unions to discipline members who engage in acts of disloyalty to the union. A proviso to Section 101(a)(2) declares that "nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution."

The foregoing reinforces a point we have stressed throughout our brief. In 1959 Congress developed precise standards to govern the imposition of union discipline. Allowing the Board to intrude into this area and to apply the very different standards of the Act to the same conduct

is certain in the long run to upset the careful balancing of interests achieved in the LMRDA.

CONCLUSION

For the above stated reasons, as well as those set out in the Union's brief, the judgment of the United States Court of Appeals for the Third Circuit, setting aside the Board's order, should be affirmed.

Respectfully submitted,

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